IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of ANDREA TEVLIN, Respondent, and DENNIS TEVLIN, Appellant.	)))))))))))	No. 61917-9-I UNPUBLISHED OPINION FILED: July 13, 2009

Ellington, J. — Dennis Tevlin appeals an order setting child support in excess of the economic table, contending the court should not have imputed income to him and that if imputation was proper, the court should have imputed income to both parents on the same basis. He further argues that in setting support above the advisory levels, the court erroneously considered costs already included in the basic support calculation. We agree and remand.

BACKGROUND

Dennis and Andrea Tevlin were married in 1986. After graduate school at Cornell University, they moved to Seattle in 1992. Both found employment with Microsoft; Dennis as a product manager and Andrea in product support services and

human resources. Their two sons were born in 1993 and 1996.

In 1998, the parties agreed that Andrea would leave Microsoft to care for the boys and to start a part-time consulting business. At the time, Andrea was earning about $65,000 a year. She exercised some stock options and netted approximately $400,000. In 2000, she opened an executive coaching business and has been working about five hours per week. Her annual earnings have been in the $8,000 to $14,000 range.

In 1999, Dennis also left Microsoft to return to his passion, music. His last salary at Microsoft was $140,000. Dennis also exercised stock options, netting approximately $13 million. In 2000, Dennis became chief executive officer at a start-up company called iObjects, later known as Fullplay Media Systems. He left Fullplay in August 2003, finding the job as stressful as his job at Microsoft. Between October 2003 and January 2006, Dennis was vice president of marketing and business development at another new high tech business, Trumba, where he took a salary of $150,000. Since then, Dennis has focused on managing and playing in his band, The Bouchards. He also started a new business, yet to be profitable, called Tevlin Music.

The parties' marriage was dissolved on May 23, 2008. The court divided the parties' assets (worth more than $8.6 million) 55/45 in favor of Andrea and found that each party is able to earn approximately $8,000 monthly from investments.

At issue here are the findings and conclusions regarding child support. Dennis testified that he would not return to high-tech employment because the stress caused him anxiety and depression. But the court found him capable of returning to corporate

employment and therefore voluntarily underemployed, and imputed an annual income of $100,000. The court also imputed part-time income to Andrea, finding that she could earn up to $25,000 working part time in her business and needed time to build her client base. The court agreed to revisit the issue of Andrea's income after one year. Based upon the parties' imputed income and investment earnings, the court found Dennis's proportional share of child support to be 58.49 percent. The court deviated above the advisory amount for support and ultimately set Dennis's transfer payment at $1,800.

Dennis argues the court erred in imputing income to him at full-time levels while imputing only part-time income to Andrea. He also contends the findings of fact are inadequate to support a child support award above the advisory amount.

ANALYSIS

We review child support orders for manifest abuse of discretion.[1] To succeed on appeal, the appellant must show that the trial court's decision was manifestly unreasonable, or was based on untenable grounds or untenable reasons.[2]

In setting child support, courts apply the uniform child support schedule,[3] which is intended "to insure that child support orders are adequate to meet a child's basic

[1] In re Marriage of Griffin, 114 Wn.2d 772, 776, 791 P.2d 519 (1990).

[2] In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) ("A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.").

[3] RCW 26.19.020; .035(1)(c); .071(1); In re Marriage of Pollard, 99 Wn. App. 48, 52, 991 P.2d 1201 (2000).

needs and to provide additional child support commensurate with the parents' income, resources, and standard of living."[4]

The first step is to set the basic child support obligation based on the parents' combined monthly net income and the number and ages of the children.[5] The obligation is then determined from an economic table. The highest combined income in the table is $7,000. Where combined net income is $5,000 or less, the support amount in the table is presumptive.[6] For incomes between $5,000 and $7,000, the table is advisory but not presumptive.[7] For combined monthly net income greater than $7,000, the court may elect to set basic support above the amount in the table based on written findings of fact.[8]

The next step is to determine the gross support obligation by adding to the basic support any extraordinary health care expenses, day care, or special child rearing expenses.[9] The total thus derived is then allocated according to each parent's share of the combined monthly income.[10] Finally, any child support credits are deducted, producing the standard calculation.[11] The court may deviate upward or downward from

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[4] RCW 26.19.001.

[5] RCW 26.19.011(1), 020; In re Marriage of McCausland,159 Wn.2d 607, 611, 152 P.3d 1013 (2007).

[6] RCW 26.19.065.

[7] Id.

[8] Id; McCausland,159 Wn.2d at 611, 620.

[9] RCW 26.19.080; see also ch. 26.19 RCW Appendix—Child Support Schedule, Econ. Table Instructions Parts II, III.

[10] RCW 26.19.080.

[11] Ch. 26.19 RCW Appendix, Econ. Table Instructions Parts IV, V.

the standard calculation upon written findings of fact.[12] [13]

The parties' combined monthly net income exceeds $7,000. The court determined the basic child support to be $1,713 per month at the advisory amount, with Dennis's percentage allocation coming to $1,222.64. The court ordered an upward deviation and set the transfer payment at $1,800, citing the parties' wealth, the family's historic child-related expenses, the special needs of the children, the cost of the children's activities, including music, sports and private school tuition, and the role of the mother with the children. In addition, the court ordered Dennis to pay 58.49 percent of the children's expenses for school, music, sports and camps.

Dennis challenges the child support determination on several grounds.

He first contends the court erred in imputing income to him where there is no evidence he was underemployed for purposes of avoiding his child support obligation.

This argument is misdirected.[14] Dennis is not employed in any gainful

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[12] RCW 26.19.075.

[13] Setting support above the economic table in these circumstances does not require deviation. When the parents' combined monthly net income exceeds $7,000, a court may order support above the advisory amount upon written findings of fact. RCW 26.19.065(3). See In re Marriage of Daubert, 124 Wn. App. 483, 495, 99 P.3d 401 (2004) ("Since incomes above $7,000 are not in the economic table, setting support for incomes above $7,000 does not require a deviation."), overruled on other grounds by McCausland, 159 Wn.2d at 619. As our Supreme Court clarified in McCausland, the court may not determine this amount by extrapolation but should consider, at a minimum, the parents' standard of living and the children's special medical, educational, or financial needs. McCausland, 159 Wn.2d at 619–20. Here, the court did not employ the McCausland approach but rather deviated upward from the standard calculation. Either approach is available to the court.

[14] Gainful employment is employment compensated by a wage or a person's usual and customary occupation. Pollard, 99 Wn. App. at 53 n.4. The court found that Dennis earns no income. Dennis does not challenge this finding.

employment. The court is required to impute income to a parent who is voluntarily unemployed or voluntarily underemployed.[15] Only where a parent is "gainfully employed" full time but is underemployed does the court inquire whether the parent is purposely underemployed to reduce his or her support obligation.[16] Dennis concedes he is voluntarily underemployed. The court was therefore required to impute income to him, and no finding of purposeful underemployment was necessary.

Dennis next contends the court should have imputed his income based upon median census bureau figures, not on his historical income in the technology industry, as he had not worked in that industry since 2006. Again, his argument is misdirected. Under RCW 26.19.071(6), income is imputed based on the median income established by the U.S. Census Bureau only "[i]n the absence of information to the contrary."[17] Here, the record contains extensive information on Dennis's previous income. There was no error.

Dennis next argues that the court erred in failing to similarly impute full-time income to Andrea.[18] The court found Andrea able to work only part time because she is

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[15] RCW 26.19.071(6); Pollard, 99 Wn. App. at 52–53.

[16] RCW 26.19.071(6); In re Marriage of Didier, 134 Wn. App. 490, 497, 140 P.3d 607 (2006) ("A court is required to find that a parent is purposely underemployed to reduce his or her child support obligation *only if* the parent is gainfully employed on a full-time basis.") (internal quotation marks omitted).

[17] RCW 26.19.071(6). At oral argument, Dennis contended the phrase "in the absence of information to the contrary" should be read to mean that income should be imputed based on the median if the parties have sufficient investment income. We note Dennis offered no support for such an interpretation, and in any event, we decline to address this belated argument. See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration).

[18] Andrea does not argue that because the court imputed less than the average

the primary caregiver of the children and will need time to increase her consulting business to the point of full-time work. Dennis contends Andrea is voluntarily underemployed and that neither her role with the children nor her need to build her client base justifies a less than full-time imputation.

We agree. The imputation of income is a legal fiction intended to accomplish a fair allocation of financial burdens between parents. When one parent chooses to work part time, the legislature requires that child support be based upon imputation of full-time income.[19]

Andrea argues she does not presently have full-time work in her consulting business. While that may be true, it is not determinative. There was no evidence Andrea had no other options. Her executive coaching business is the type of work she did for Microsoft and for which she is highly trained.

On this record, we hold that the court abused its discretion in failing to find that Andrea was voluntarily underemployed. Pollard and Wright mandate that Andrea be imputed full-time income.

Dennis also argues the court erred by "double-counting" certain expenses. Again, we agree. In addition to the transfer payment, Dennis is to pay his proportionate share of historical tuition and educational expenses, school and school-related expenses, music lessons, equipment and supplies, sports equipment, including uniforms, sports enrollment and costs, and camp enrollment and costs. But the court

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full-time income to Dennis, its imputation to her was a similar exercise of discretion.

[19] In re Marriage of Wright, 78 Wn. App. 230, 234, 896 P.2d 735 (1995); Pollard, 99 Wn. App. at 52–53.

considered those same expenses in setting support above the standard table:

> Possession of wealth;
> The children's needs and the family's historic child-related expenses;
> Special medical, educational, or psychological needs of the children;
> The children's involvement in activities, including music and sports;
> The cost of private school tuition in which the children are enrolled; and
> The role of the mother with the children.[20]

There is no evidence the children have special medical or psychological needs, and the court found the children are doing well and have "tremendous potential."[21] The parties agreed to share the costs of private school tuition and the children's involvement in music, sports and other activities in the same percentages as the basic child support, over and above the transfer amount. Thus three of the five reasons have already been taken into account, and the court does not explain why deviation on these same grounds is necessary. Whether the court would order a deviation based on the other factors is unclear.[22] On remand, the court should support any deviation with specific findings.[23]

Finally, Dennis requests that we direct the trial court to order restitution of

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[20] Clerk's Papers at 93.

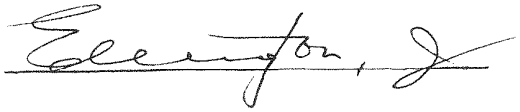
[21] Clerk's Papers at 116.

[22] We note that the court's reference to the role of the mother was also a form of double counting because the court had imputed only part-time income to her for the same reason. It will not, however, be redundant on remand, because that factor will no longer be considered in setting the basic support amount once Andrea is imputed full-time income.

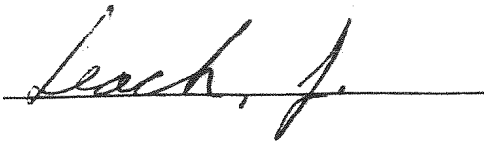
[23] See RCW 26.19.075(1) (setting forth a nonexhaustive list of reasons for deviation from the standard calculation); McCausland, 159 Wn.2d at 620–21 (when determining whether to exceed the economic table, a court should consider, at a minimum, the parents' standard of living and the children's special medical, educational, or financial needs, although the inquiry is not limited to these factors alone).

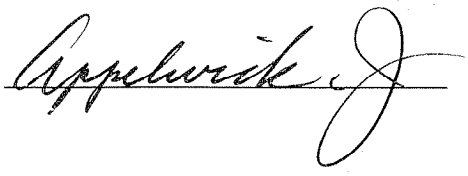
amounts overpaid as child support. But the child support determination will be made on remand. Reimbursement for any overpayment is a matter within the discretion of the trial court, which should take into account "'the amount of the excess payments, whether the payments have already been spent in support of the child, and whether the sum is readily available for restitution without causing undue hardship upon the receiving parent or the child.'"[24]

Reversed and remanded.



WE CONCUR:





[24] In re Marriage of Krieger and Walker, 147 Wn. App. 952, 968, 199 P.3d 450 (2008) (quoting In re Marriage of Stern, 68 Wn. App. 922, 932, 846 P.2d 1387 (1993)).